SUMMARY OF ARGUMENT

I

In the instant case the NLRB concluded that a successor employer who repudiates the collective agreement in force at the employing industry violates §§ 8(a)(5) and 8(d) of the NLRA. In *Wiley* v. *Livingston,* 376 U.S. 543, 544, this Court concluded that a successor employer "must arbitrate with the union under a bargaining agreement between the union and" his predecessor. In *Wiley,* the Court was not called upon to decide, and did not in fact reach, the question presented here. Nevertheless, as the Board correctly appreciated, the rationale of *Wiley,* taken against the background of settled law, leads ineluctably to the conclusion that the entire contract, and not just the arbitration clause, continues in effect. This follows if *Wiley* is simply given its due as a principled decision, or if the proper status of the balance of the agreement is analyzed in terms of the policy consideration emphasized in the Court's opinion.

First, since the arbitrator's basic function is to interpret and apply existing collective agreements (*Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597), the substantive terms of the contract must survive where *Wiley* applies or there would be no legitimate function to be fulfilled by the arbitration that has been order.

Second, the conclusion that the entire contract survives flows also from *Wiley's* emphasis (376 U.S. at 549-551) on the desirability of easing the effects of a transition caused by a change in owners by protecting the employees' legitimate expectations engendered by their collective agreement, and its recognition that achievement of this desirable end was permissible because of the non-consensual nature of collective agreements. For arbitration is *a* means, not *the* means, for "protect[ing] the employees from a sud-

den change in the employment relationship" (*Wiley*, 376 U.S. at 549) during the term of a collective agreement. Indeed, since it is one means among many, not an end in itself, it serves that goal only if the arbitration concerns the substantive terms and conditions agreed upon by the parties—in other words, only so long as the entire contract continues in force.

II

Wiley does not apply in every case in which one employer replaces another. The second employer is a "successor" if there is "substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551). The applicable test is derived from the one the Board had evolved for determining when a new employer is required to recognize an already established union. And in light of the well established criteria which have been developed in applying the "substantial continuity" test, there can be no doubt that Burns is a successor. For as both the Board and the court below recognized (A. 189), this is a paradigm case of successorship—the successor, a large multi-unit company organized along the same lines as the predecessor, continued to perform the same work, at the same place, and with a high proportion of the same employees.

ARGUMENT

I

THE PRINCIPLES ENUNCIATED IN *WILEY* v. *LIVINGSTON*, 376 U.S. 543, REQUIRE SUCCESSOR EMPLOYERS TO HONOR THE COLLECTIVE AGREEMENT IN FORCE AT THE EMPLOYING INDUSTRY.

1. In the instant case Burns refused to recognize Local 162 United Plant Guard Workers, the certified bargaining

representative of the plant protection employees at the Lockheed Aircraft Service Co., Ontario, California, and repudiated, in mid-term, the collective agreement covering those employees. The NLRB found that by so doing Burns had violated § 8(a)(5) of the NLRA and ordered the Company, *inter alia*, to "honor, adopt and enforce the contract." A. 4-5, 26-27.

If Burns had been the signatory employer to the agreement in question the Board's conclusion would have followed as a matter of course from settled NLRA law:

> "[W]here . . . the breach of contract by repudiation is an intrinsic part of the unfair labor practice of refusing to recognize and bargain with the duly constituted representative, the Board's jurisdiction, under section 10(c), includes the power to remedy that phase of the unfair labor practice. See Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 236 . . . Since the repudiation of the contract was based on the refusal to recognize and bargain with the Union, part of the appropriate remedy was to eradicate the repudiation by requiring the employer to 'honor' the contract. See H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, 526.
>
> "Read in this light, the word 'honor' has the limited role of placing the parties, with reference to the contract, back in the position which they occupied prior to the breach. It does not mean that specific performance was decreed as Hyde contends. Nor is it an adjudication as to the validity of any or all of the contract provisions." *NLRB* v. *Hyde*, 339 F.2d 568, 572-573 (C.A. 9); see also *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421; *NLRB* v. *Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8).

Here, however, the signatories were the Union and the Wackenhut Corp. and Burns was Wackenhut's successor.[1]

[1] We develop the argument supporting the conclusion that the Board's "successorship" finding was correct in part II *infra*, pp.——.

In light of the principle enunciated in *Wiley* v. *Livingston*, 376 U.S. 543, the Board concluded that this was a distinction without a legal difference. It stated that:

> "Section 8(d) . . . clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.
>
> "The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor; [it] is reasonably related to Burns . . . Burns is [therefore] bound to that contract as if it were a signatory thereto . . . [I]ts failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act." A. 9-10.

In reaching this conclusion the Board reasoned: that, from the first, § 8(a)(5) has been interpreted as requiring a successor to recognize the union established at the employing industry (e.g., *Stonewall Cotton Mills*, 80 NLRB 325, 327); that, as a general rule, the bargaining obligation includes the duty to honor a valid contract in force (e.g. *NLRB* v. *Hyde*, 339 F.2d at 572-573); that, nevertheless, prior to this Court's decision in *Wiley*, the Board had not required the successor to honor the contract because it had followed the common law "privity of contract" rule (e.g. *Jolly Giant Lumber Co.*, 114 NLRB 413); that *Wiley* had rejected that common law rule; and that this rejection, the

overall structure of the Act, and the policy considerations cited in *Wiley* all demonstrate that a repudiation of a collective agreement by a successor, no less than a repudiation by the employer who originally signed the contract, is a violation of § 8(a)(5). A. 6-11.

To be sure, as the court below emphasized (A. 191-192), *Wiley* presented a narrower question than the one posed here—namely, whether a successor "must arbitrate with a union under a bargaining agreement between the union and" his predecessor (376 U.S. at 544). As noted in the AFL-CIO *amicus* brief in *Wiley*, the only brief which argued that the federal law of labor relations requires the conclusion that successor employers must arbitrate, the litigation posture of that case presented:

> "a situation which [was] in many resepects familiar to this Court. A union claims that employees are entitled to certain rights and benefits under a collective bargaining agreement. The employer disagrees. The agreement provides a grievance and arbitration procedure 'as the sole means of obtaining adjustment' of any dispute 'arising out of or relating to this agreement, or its interpretation or application, or enforcement.'' The employer, however, refuses to submit the dispute to arbitration. By an action under Section 301 of the Labor Management Relations Act the union seeks to compel the employer to arbitrate.
>
> "The sole question presented is whether the employer is obliged to arbitrate the underlying dispute with the union. The merits of that underlying dispute are not before the Court. The union has not asked this Court—or any court—to determine whether the employees are entitled to the seniority, pension, severance-pay, vacation, and other benefits which the union claims. It asks only that the question be determined in accordance with the arbitration provision of the

agreement." AFL-CIO Amicus Brief in No. 91 Oct. Term 1963, pp. 1-2.

And, of course, once it had been determined that arbitration was required the Court's function was at an end:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." *Steelworkers* v. *American Mfg. Co.* 363 U.S. 564, 569.

Thus, the Court was not invited to reach, and *Wiley* does not settle in terms, the question of the extent to which the substantive provisions of a collective agreement survive a change in ownership which does not destroy the employing industry. But, as the Board correctly appreciated, the rationale of *Wiley*, taken against the background of settled law, leads ineluctably to the conclusion that the entire contract, and not just the arbitration clause, continues in effect. This follows if *Wiley* is simply given its due as a principled decision, or if the proper status of the balance of the agreement is analyzed in terms of the policy considerations emphasized in the Court's opinion.

2(a) Since the focus here is on *Wiley's* implications, rather than on its square holding, the proper starting point is the logic Justice Harlan employed in reaching the conclusion that successors are required to arbitrate. Briefly stated the opinion proceeds as follows:

First, the question presented was to be dealt with in terms of the federal law of labor contracts: "Both parties urge[d] that this question [was] for the courts" and the Court concluded (citing *Atkinson* v. *Sinclair Refining Co.* 370 U.S. 238, 240) that:

> "Past cases leave no doubt that this is correct . . .

> the duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Wiley,* 376 U.S. at 546-547.

Second, the governing federal law fashioned "from the policy of our national labor laws," (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456) was grounded on the proposition that industrial peace will be furthered if the contractual protections embodied in a collective agreement are preserved when the employing industry survives a change in ownership:

> "The negotiations leading to a change in corporate ownership . . . will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'" *Wiley,* 376 U.S. at 549.

Third, because of the unique function and character of collective bargaining agreements, it was proper to dispense with common law notions of "privity of contract" and to hold that the successor is bound by the settlement negotiated by his predecessor:

> "A collective bargaining agreement is not an ordinary contract . . . Central to the peculiar status and function of a collective bargaining agreement is the

> fact . . . that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." *Wiley*, 376 U.S. at 550-551.

(b) The *Wiley* opinion makes it manifest that the Court's decision was grounded in, rather than being a departure from, prior § 301 law. This in itself demonstrates that it was not the Court's intention to leave arbitrators, and the Board (cf., *NLRB* v. *Acme Industrial Co.*, 386 U.S. 432, 436-437), at large in determining the parties' substantive obligations in successorship situations. As the language of § 203(d) shows, the national labor policy favors voluntary private adjustments as "the desirable method for settlement of grievance disputes arising over the application or interpretation of *an existing collective-bargaining agreement*" and not as a general cure-all. Thus, while this Court has given an hospitable scope to arbitration, it has also recognized that:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but

to refuse enforcement of the award." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597.

Since the arbitrator's basic function is to interpret and apply agreements, the substantive terms of the contract must survive where *Wiley* applies or there would be no legitimate function to be fulfilled by the arbitration that has been ordered. As Arbitrator Rolf Valtin asked in his recent comprehensive discussion of the effect of *Wiley:*

> "Wherefrom if not the Agreement, [does] the obligation to arbitrate arise and in relation to what, if not the Agreement, [is] there . . . to be arbitration?" *U.S. Gypsum Co.*, 56 LA 363, 388.

Indeed, the *Wiley* opinion emphasizes the bonds that tie the arbitrator to the agreement. It begins from the premise that "the duty to arbitrate [is] of contractual origin," recognizes the contractual base of the successor's obligation throughout, and concludes that *Wiley* "cannot readily be assimilated to the category in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated" (see 376 U.S. 547-555). Thus, the fair implication of *Wiley* is that the parties' substantive obligations must also stem from the agreement. And this is simply another way of stating that the entire contract and not simply the arbitration clause continues in force.

(c) The conclusion that the entire contract survives flows also from *Wiley's* emphasis on the desirability of easing the effects of a transition caused by a change in owners by protecting the employees' legitimate expectations engendered by their collective agreement, and its recognition that achievement of this desirable end is permissible because of the non-consensual nature of collective agreements.

A union, representing employees who are performing the same jobs in the same enterprise, is unlikely to submit

peacefully to terms and conditions of employment more burdensome than those which it previously accepted—and, indeed, by which the employer would still be bound but for the fortuity of the sale. And an employer, who has employees who are performing the same jobs in the same enterprise, is equally unlikely to submit peacefully to terms and conditions of employment more advantageous than those the union had previously secured—and, indeed, by which the union would still be bound but for the fortuity of the sale. In other words, either party would consider it extraordinarily unfair for the other to attempt to gain an advantage simply because of a change in ownership of the business.

This reaction occurs, of course, because the collective agreement is not simply a bilateral arrangement binding only on its signatories; it is "an effort to erect a system of industrial self-government" (*Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580) governing the day-to-day affairs of the bargaining unit—the industrial community. The rules so established are binding upon the employees not by virtue of principles of contract law, but by virtue of the federal labor laws. Although it is common to describe the union as the "agent" of the employees, it is obviously not an agent in the usual sense. Once a union is selected by the majority of employees in a bargaining unit, § 9(a) of the Act grants it the authority to bind all the employees, including those who do not wish to be represented in the establishment of the rules. In addition, all the employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. *J. I. Case Co.* v. *NLRB*, 321 U.S. 334. Moreover, no individual employee has the right to make a private agree-

ment with the employer, and any such agreement is void. *Ibid.* As this Court said in *J. I. Case*, 321 U.S. at 335:

> "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service . . . which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."

It follows, as *Wiley* recognizes, that it is no more radical to hold that a purchaser of a business is bound by the collective agreement than it is to hold that subsequently hired employees are bound by it. Both are strangers to the agreement when made. But both should be held to accept the agreement as the rule of the community as a condition of their entrance into it.

This willingness to bind those who have not consented, as *Wiley* indicates (376 U.S. at 550), stems from the fact that a collective agreement is not a consensual arrangement. When an employer hires his employees, he is prohibited by § 8(a)(3) of the Act from selecting them on the basis of their membership or nonmembership in a labor organization. Thus, he cannot avoid entering into the agreement by careful selection of his work force. And when a union demonstrates that it represents a majority of those employees, the employer has no choice as to whether or not to negotiate with that union; he is required by §§ 8(a)(5) and 8(d) not only to meet with and talk to the union, but to make a sincere effort to reach an agreement. It is plain therefore that there is nothing consensual about the relationship between the parties. Moreover the agreement which emerges from this type of non-voluntary relationship cannot be termed "consensual" in the usual sense. In no

other context, so far as we are aware, does the law require private citizens to meet and make a sincere effort to reach a *modus vivendi*, and reduce their agreement to writing.

Thus *Wiley*, like *J. I. Case*, is a product of the recognition that because of the implications inherent in the nonconsensual nature of the bargaining relationship, it is permissible to apply collective agreements to those who have not consented to be bound. To do so does not trench on the parties' right to strike their own bargain. In both instances a bargain has been freely struck and the effect of both the *Wiley* and *J. I. Case* rules is to insure that the parties' just anticipation of contractual stability is not frustrated.

The conclusion that those who have not consented should in certain instances be bound is not one-sided. Orderly and peaceful labor relations are a benefit to the employer as well as the employees and the public. That is the lesson of *Kota Divison of Dura Corp.*, 182 NLRB No. 51, where the Board found that the union violated the Act by seeking new employment conditions over the objections of the successor employer who wished to continue the preexisting agreement. Indeed, while the present litigation demonstrates that not all employers acknowledge this simple truth there is substantial management recognition that the Board's decision here is even handed. As Lawrence F. Doppelt, a partner in a firm representing employers, has stated:

> "Economics, logic, and the realities of industrial relations generally require that the successor recognize its predecessor's union, if only to avoid labor turmoil. No self-respecting union will permit itself to be ousted from an established collective bargaining relationship without some kind of struggle, merely because of a change in employer ownership, be it economic or legal. And the last thing most successors want at the time

of a business takeover is labor trouble, whether in the form of a work stoppage, a picket line, or protracted litigation. Further, where a predecessor's employees are accustomed to union benefits and representation, the successor may validly believe that attempting to operate without a union will result only in employee unrest and future union organizational efforts, adversely affecting production and efficiency.

A successor recognizing its predecessor's union for the above or other practical reasons generally assumes the obligations of its predecessor's union contract based on similar considerations. By so assuming the contract, the successor also protects itself in two important respects for the contract term: its major costs and obligations will not exceed those set forth in the contract; and, since most contracts contain a no strike clause prohibiting union strikes and employee work stoppages, there are basic assurances against severe industrial strife. If, on the other hand, the successor recognizes the predecessor's union without its union contract, it gives the union the opportunity to engage in collective bargaining for a new contract, and a sophisticated successor recognizes that, when a union bargains, it wants more. Under normal circumstances, it would be naive to expect a predecessor's union to settle for less than it had in its predecessor's contract, or even for the same thing. Moreover, without a contract in effect, the union is free to strike and otherwise exert economic force against the successor." Doppelt, *Successor Companies: The NLRB Limits the Options—And Raises Some Problems,* 20 DePaul L.Rev. 176-177 (footnotes omitted).

The force of the points just developed can be escaped only if the arbitration clause is regarded as unique. For the basic canons of legal reasoning indicate that in determining the status of the remainder of a labor contract in a successorship situation, the approach followed in deter-

mining the sole issue presented in *Wiley* should be followed unless the preference for arbitration is *sui generis*.

Arbitration is in fact only one facet of the overall emphasis on furthering stable labor relations during the term of a collective agreement. During the negotiation of labor contracts "the policy in all national labor legislation is to let loose the full economic power of each [party]." *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 384; see also *American Ship Bldg. Co.* v. *NLRB* 380 U.S. 300; *NLRB* v. *Insurance Agents International*, 361 U.S. 477. This policy is not, of course, a glorification of strife for its own sake. "Collective bargaining with the right to strike at its core" (*Motorcoach Employees* v. *Missouri*, 374 U.S. 74, 82) is encouraged as a means of promoting industrial peace:

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20 (1935).

After the consummation of an agreement the push of the law is to promote stability by restricting the occasions for strife. Section 203(d) promotes this end by encouraging grievance and arbitration procedures. Section 301 serves the same function by making collective agreements enforceable in court. And § 8(d) of the Act, as the Board stated in *C & S Industries*, 158 NLRB 454, 457, and reemphasized in the instant case (A. 9-10), embodies the "statutory intent to stabilize during a contract term agreed-upon conditions of employment."

In short, arbitration is *a* means, not *the* means, for "protect[ing] the employees from a sudden change in the employment relationship" (*Wiley*, 376 U.S. at 549) during

the term of a collective agreement. Indeed since it is one means among many, not an end in itself, it serves that goal only if the arbitration concerns the substantive terms and conditions agreed upon by the parties—in other words, only so long as the entire contract continues in force.

3. Two caveats are in order. First, it is of the essence to note the limited effects of a holding that a successor is bound by the entire collective agreement. As the language from *NLRB* v. *Hyde* quoted on p. 4 *supra* shows, whether the original employer or a successor is involved, the holding that § 8(a)(5) has been violated by a repudiation of the contract simply entails the conclusion that the successor is obliged to grant the employees whatever rights and benefits they are entitled to under the contract. It does not settle the entirely separate question as to what the agreement means. And it is the answers to that question which determine the exact nature of the employer's obligations.

Thus *Wiley* means that the successor will not be heard if he argues that he is inhibited from running the business as he wishes by restrictions in the collective agreement. He has no more standing to make a claim for "relief" predicated on the fact that he was not a party to the negotiations than a new plant manager sent in by dissatisfied stockholders who feel that the labor situation in the plant has gotten out of hand. Because of the costs inherent in the unstable labor conditions which would result from any other policy, both must wait until the expiration of the contract, a period which rarely exceeds three years, to renegotiate the contract unless the employees and the union can be convinced that the common interests of all concerned will be served by a voluntary reopening.

The collective agreement may, however, allow the new

owner to make extensive entrepreneurial changes, and he may see problems and possibilities inherent in the situation facing the company that were unforeseen, and perhaps unforeseeable, from the vantage point of those who negotiated the contract. At this point the successor might argue that, even though it cannot be said that the employing industry has been destroyed, the changed circumstances have relieved him of the obligations imposed by certain provisions of the contract because those provisions no longer fit the situation. Nothing in *Wiley* or the Board holding here pretermites that contention. For it raises questions concerning the agreement's meaning. And *Wiley* specifically directed that those questions are to be referred to the arbitrator to determine "the effect of the merger on the rights of the covered employees" (376 U.S. at 554-555).

Recognizing the fact that changed conditions may be taken into account in interpreting an agreement under *Wiley* is, of course, not to make new law, nor to allow the interpreter the power to pick and choose the contract terms he will enforce. Even when there is only one employer in the picture it is by no means unusual for the contract to allow him to carry out entrepreneurial decisions designed to meet changed circumstances which result in extensive changes in the working environment of the plant. Moreover, because of the breadth of regulation undertaken in a collective agreement and the difficulties inherent in the attempt to set up a system of industrial self-government, there will, of course, be unforeseeable contingencies that will arise. As this Court has recognized, the foregoing does not mean that the resulting problems are deemed to be unregulated and that the agreement is no longer binding; their resolution, within the confines of the contract, are grist for the arbitrator's mill:

> "The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Warrior & Gulf*, 363 U.S. at 581-582.

Where a successor is involved, it is reasonable to suppose that there will be no shortage of these difficult questions of interpretation. But these questions will not be different in kind from those that arise in the one-employer situation. *Wiley* itself amply illustrates this point. The difficult problems in that case stemmed not from the merger of Wiley and Interscience but from Wiley's post merger decision to consolidate two previously separate operations in one plant. And the complex task of working out those problems would have been exactly the same if there had been no merger and if Wiley had been a two-plant company which decided to merge its two previously separate operations. See *Interscience Encyclopedia*, 55 LA 210, the arbitration in *Wiley* on remand. The process of contract interpretation and administration mandated by §§ 203(d) and 301 insures sufficient flexibility in cases involving one employer, and the underlying postulate of *Wiley* is that this process is sufficiently adaptable to serve the same salutary function where there is a successor.

Second, it should be noted that just as the effect of *Wiley* on the meaning of the labor contract may easily be overstated, so too may its effect on the parties' ability to order their own affairs on successorship. In order to encourage

peaceful and stable labor relations, the *Steelworkers' Trilogy* recognizes a presumption that all questions concerning the contract are to be referred to arbitration. The parties, if they so desire, may overcome this presumption by the use of plain and unambiguous language indicating their desires. Thus, one of the basic functions of the *Trilogy* is to encourage the parties to consider and settle the role that arbitration should play in their contractual relationship. By the same token, *Wiley* recognizes a presumption that successors will be bound by the collective agreement in force at the time of the change in ownership. In this instance, as in the case of arbitration, the parties may overcome this presumption by the use of plain and unambiguous language indicating their desires. Thus *Wiley*, like the *Trilogy*, encourages rather than precludes responsible private decision making.

4. The court below developed two arguments in refusing to enforce the Board's order requiring Burns to honor the contract. First that:

> "The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts '[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.'" A. 190.

Second that *Wiley* held only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that *Wiley* did not sign the contract being construed." A. 191-192.

The contention that *Wiley* does not support the Board's decision is, as we have attempted to demonstrate, without support in reason. It accords this Courts opinion "the nar-

rowest possible reading focusing only on the specific literal language of the [holding] rather than the broad'' implications of its rationale (cf, *Transportation Union v. Michigan Bar,* 401 U.S. 576, 580).

The argument that *H. K. Porter* v. *NLRB,* 397 U.S. 99, is decisive here is no less defective. As the Second Circuit's language indicates, both ''the Board and the courts'' are without power to write contracts for the parties. But *Wiley* settles the proposition that this limitation does not preclude a court from imposing the duty to arbitrate upon a successor. For such a case:

> ''. . . cannot readily be assimilated to the category of those in which there is no contract whatever . . . There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate [in that] contract construed in the context of a national labor policy.'' (376 U.S. at 550).

Thus the Court expressly disclaimed any authority to write contracts. It made it perfectly plain that it was simply requiring adherence to a contractual commitment entered into by the union and the predecessor, a party ''reasonably related'' to the successor. And of course *Wiley* carries an implied commitment by the courts to enforce arbitral awards against successors—awards, which as already pointed out (pp. 9-10 *supra*) are legitimate only if they draw their essence from the union-predecessor collective agreement.

This being so, the view that the Board can not order a successor to honor a contract is completely unwarranted. It could be entertained only if *H. K. Porter* were read to overrule *Wiley sub silentio.* For *Wiley* and the Board's decision here are based on exactly the same theory of contractual obligation—that:

> ". . . a holding that [the successor] is obligated to honor and adhere to the express terms of the contract [cannot] readily be equated with compelling [him] to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which [the successor] took over; it was negotiated on behalf of the employing enterprise by [his] predecessor." A. 10; compare *Wiley,* 376 U.S. at 551.

If the courts have the power, under § 301, to compel a successor to arbitrate without running afoul of the prohibition against writing contracts, as we know they do, the Board assuredly has the statutory power to compel a successor to honor the contract without transgressing that limitation. And there is not the slightest inference in *H. K. Porter* that the Court intended to question *Wiley.* Indeed, since *Wiley* is firmly based on a contract the parties had written without governmental interference, its rationale and *H. K. Porter's* are entirely consistent. The two cases would be inconsistent only in the event that it were held that *Wiley* empowers arbitrators to write new contracts for the parties rather than limiting them to applying the agreement in force.

5. In summary, Mr. Doppelt is, we submit, clearly correct in concluding that:

> "[U]pon . . . mature consideration, it is difficult to fault the Board for its *Burns* decision. For one thing, the Board was not truly setting labor policy in this instance; rather; it was merely following labor policy previously set forth in court cases in which it was not involved.
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> * * * *
>
> "The principle for which [*Wiley*] stands not only paved the road for the Board's *Burns* decision, but escorted the Board most of the way down it.

"Further, it appears fair to state that with *Burns* the Board has 'caught up with the exigencies of the collective bargaining community [and] recognized the realities of the employer-employee relationship.' After all, *Burns* merely codifies what most employers and unions do in any event, and it thereby fulfills the reasonable expectations of the union and employer involved. It also fulfills the expectations of the predecessor's employees. . . .

"Permitting a successor to flout such reasonable expectations by rejecting a precedessor's union contract may result in industrial instability. Employees are carefully taught by both unions and employers that the union contract is, indeed, the shop law. It governs the actions of all parties: Employees as well as employers are expected to abide thereby. Moreover, employees know they have secured their contractual rights through the give and take of collective bargaining, often ceding desired ends in order to obtain others. If employees observe contractual law being ignored by the successor, with their contractual gains dissipated, they are trained that industrial laws may be disregarded by parties at opportune moments. This, of course, invites industrial lawlessness, disrespect for industrial rules, and overall cynicism of the entire collective bargaining process.

"The *Burns* rule, on the other hand, can further the basic labor policy by avoiding "industrial strife." With *Burns*, all parties know where they stand from the outset of their relationship. They are aware of their mutual rights and obligations. This ordinarily reduces confrontations and disputes, necessarily adding to labor stability. Further, a successor's refusal to honor a predecessor's union contract can lead to strikes and other labor unrest, hardly enhancing the Act's aim of minimizing industrial strife.

"Finally, *Burns* protects those most needing protection. The successor, of course, can protect itself

against much of the unfairness otherwise inherent in *Burns*. It can ascertain the terms of a predecessor's union contract before making an acquisition, and consider any burdensome terms in deciding whether to close the deal or to seek financial concessions from the predecessor. The employees, on the other hand, may have no protection without a contract. While there is, indeed, a breed of enlightened employers, there is also the employer who is enlightened only if legally or economically forced to be. Left to his own devices, such employer could deprive employees of valuable contractual gains, including wages, benefits and job security accumulated only after long, hard struggles." *Dappelt*, 20 DePaul L. Rev. at 183-184.[2]

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[2] The Board reserved the authority to make exception to the rule established in the instant case to accommodate "unusual circumstance," A. 9. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139, it exercised that authority to except successor employers operating under the Service Contract Act of 1965, 41 U.S.C. § 351, *et seq.* The Board's conclusion in *Emerald Maintenance* that "this case suggests the hazards of enforcing the contracts of one employer against a successor where annual re-bidding normally produces annual changes in contractor identity" flies directly in the face of its decision here in which it supported its decision on the ground that the employees worked "in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing" (A. 11). Moreover, there are substantial grounds for believing that *Emerald Maintenance* rests on a misreading of the Service Contracts Act. See Special Subcommittee on Education and Labor, House of Representatives, 92 Cong., 1st Sess., "The Plight of Service Workers Under Government Contracts" (Comm. Print 1971). Finally, there is a question as to whether the *Emerald Maintenance* exception applies to employers operating under negotiated procurement agreements with the United States. That question is being litigated before the Board at the present time. *Atlantic Technical Services Division of Southeast Enterprises, Inc.*, NLRB Case No. 12-CA-5158.

Emerald Maintenance turns on the Board's interpretation of the Service Contracts Act and its determination that the policies of that Act take priority over the *Burns* principle. Since the Service

II

THE BOARD'S SUCCESSORSHIP DETERMINATION WAS CORRECT.

1. *Wiley* does not apply in every case in which one employer replaces another. The second employer is a "successor" if there is "substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551). This serves to insure that the contractual obligations imposed are not "something imposed without, not reasonably to be found in the particular bargaining agreement and the acts of the parties," *(ibid)*. While this standard is new to the law of contracts it did not emerge full blown in *Wiley*. The applicable test is derived from the one the Board had evolved for determining when a new employer is required to recognize an already established union. See A. 7-9; compare the AFL-CIO *Amicus* Brief in *Wiley* at pp. 13-14. And in light of the well established criteria which have been developed in applying the "substantial continuity" test, there can be no doubt that Burns is a successor. As the court below stated:

> "The determination that an employer is a successor is made on the basis of 'continuity in the business operation,' *NLRB* v. *Zayre Corp.*, 424 F. 2d 1159, 1162 (5th Cir. 1970), that is, 'whether the operation is essentially the same as that previously conducted . . .' *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). . . .
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> * * * *
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> "All of the important factors which the Board has

Contracts Act is not involved in the instant case, it is obviously most appropriate for the validity of the Board's reasoning in *Emerald Maintenance* to be determined through a process of "litigation elucidation" (*San Diego Building Trades Council* v. *Garman*, 359 U.S. 236, 241) after the validity of *Burns* has been decided. For this reason we do not treat with the merits of *Emerald Maintenance* herein.

used and the courts have approved are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions,' *NLRB* v. *Zayre Corp., supra,* at 1163 (footnote omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

[1] Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation* v. *Livingston,* 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is relevant to show similarity of operations. *Id.*" A. 189.

And, of course, Burns' reliance on "the total absence of dealings between" it and Wackenhut (Pet. p. 1) is completely undermined by *Tom-A-Hawk Transit, Inc.* v. *NLRB,* 419 F.2d 1025, 1026-1027 (C.A. 7); a case in which one bus line franchisee replaced another to perform the "identical . . . basic operations and services," where the Seventh Circuit noted:

> "'Tom-A-Hawk maintains that successorship requires some form of privity between the employers and that none existed here since there was no transfer of assets or other direct dealing between Aurora City Lines and Tom-A-Hawk. . . . However, no direct contractual relationship is required, for example, 'when contract, death, or operation of law brings about change of ownership in the employing agency.' Similarly there need be no transfer of assets. As the Board said of Maintenance, Inc., 148 N.L.R.B. 1299, 1301 (1964):

> The duty of an employer who has taken over an 'employing industry' to honor the employees' choice of bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act.
>
> "Therefore, we do not think that the absence of dealing between Aurora City Lines and Tom-A-Hawk bars a finding of successorship in this case. The evidence clearly establishes the requisite finding of continuity in the employing industry."

In short, as both the Board and the Second Circuit recognized, this is a paradigm case of successorship—the second employer, a large multi-unit company organized along the same lines as the predecessor, continued to perform the same work, at the same place, and with a high proportion of the same employees.

2. While the *Wiley* test of successorship is derived from prior Board law it is not, and indeed could not, be identical. As we noted to the Court in *Wiley:*

> "We do not mean to suggest that the question of whether the union's representative status survives a change in ownership is exactly the same question as whether an existing collective bargaining agreement survives. One test which the Board applies in answering the first question, for example, is whether there has been any substantial change in the identity of the employees. Obviously, that question cannot itself be relevant in determining whether the agreement survives, since if the new owner is bound by the agreement he would not be permitted to replace the old employees with new ones except in accordance with the

agreement." AFL-CIO *Amicus* Brief in No. 91, Oct. Term 1963, n. 6, pp. 14-15.

Recognizing the force of this logic *Monroe Sander Corp.* v. *Livingston*, 377 F.2d 6, 12 (C.A. 2), *cert. denied*, 389 U.S. 831, holds that a finding of successorship is proper even though the successor retained "none of the former . . . employees." The Second Circuit there explained *(ibid)*:

> "Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of operations. Wiley, 376 U.S. at 481, . . : [Here] there was other adequate evidence of identity of operations. Moreover, the failure to hire Sander employees in New Jersey could not be determinative where, as here, that failure is the nub of the dispute."

For the necessary predicate of the proposition that the second employer's refusal to retain the work force previously employed negates a finding of successorship is that the employer is legally free to refuse to hire them. That, of course, was the pre-*Wiley* situation. Prior to *Wiley* a successor took free and clear of the labor agreement. He was, therefore, at liberty to hire and fire for good reason, bad reason or no reason at all. After *Wiley*, however, a discharge by a successor without good cause is a proper subject for arbitration where as here the collective agreement limits discharge and discipline to situations in which there is "just and sufficient cause" (A. 154-155). That is the lesson of *Monroe Sander*. As Mr. Doppelt states:

> "In the past, a successor frequently rejected those predecessor employees it considered did not meet its standards, basing its rejections on interviews or other considerations. Although such standards were often vague, the successor was under no greater burden to justify any such rejections than in the case of new

> hires. However, almost any union contract now assumed by a successor, as a result of *Burns*, will require that employees be discharged only for 'fair' or 'just cause,' meaning, under the contract's grievance and arbitration procedures the employer has the burden of proving an employee has engaged in serious or repeated misconduct in order to justify a discharge. Such a clause would, quite possibly, protect a predecessor's employees: They are technically the successor's employees at the time of the business transfer and the successor's failure to hire them is in effect a discharge. Thus, the successor's right to reject those predecessor employees it deems unacceptable without showing a justifiable reason therefor would be severely limited." Doppelt, 20 DePaul L. Rev. at 186-187.

Where the agreement continues in force, in other words, discharges without proper cause are a contract violation. To say that such violations free an employer, who would otherwise be a successor, from his overall obligation to honor the agreement is evident nonsense in the strict meaning of that word. The same factor cannot be both the determinant of whether *Wiley* applies and the subject to be decided in the arbitration *Wiley* decrees.

Equally to the point, a rule which rewarded an employer by relieving him of successor status by reason of his refusal to continue the predecessor's employees would be directly contrary to *Wiley*'s basic policy—that:

> ". . . the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers [should] be balanced by some protection to the employees from a sudden change in the employment relationship." (376 U.S. at 550).

For such a rule would encourage employers who would otherwise be successors to discharge the very employees whom the Court sought to protect. *Wiley* would then result

in the predecessor's employees losing not only their contract rights but their jobs by reason of the advent of a second employer. And that would in truth be "to turn the blade inward." *Graham* v. *Locomotive Engineers,* 338 U.S. 232, 237.

The conclusion that the composition of the work force is not decisive in determining the second employer's § 8(a)(5) obligations is entirely consistent with the overall thrust of the relevant law. Employee turnover cannot defeat the original employer's duty to recognize an established union during the certification year, *Brooks* v. *NLRB,* 348 U.S. 96, or, in light of the so-called "contract bar" rules, during the term of a collective agreement, *General Cable Corp.,* 139 NLRB 1123. And the Board has squarely recognized that its contract bar rules apply to successors. *Barrington Plaza,* 185 NLRB No. 132.[3]

The conclusion is therefore manifest that, in determining whether the employing industry survived, the Board and

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[3] Naturally, as *Wiley* itself makes clear, the second employer's voluntary decision to utilize some or all of those who have been working at the employing industry is "evidence . . . of similarity and continuity of operation across the change in ownership" (376 U.S. at 551): For the employer's self-interest guarantees that such a decision is motivated by the fact that the transfer has not changed the nature of the work to be done. This does not mean that a majority of the second employer's work force must be drawn from his predecessor to support a successorship finding. In *Wiley,* the predecessor had a work force of forty employees. The successor had a work force of 340 employees, of whom forty had been in the predecessor's employ and successorship was found despite the fact that the predecessor's employees constituted a small minority of the successor's work force. The upshot is, as Judge Harold Leventhal stated, concurring in *IAM, District Lodge 94* v. *N.L.R.B.,* 414 F.2d 1135, 1140 (C.A. D.C.), that a finding of "full successorship" requires at the most "some retention of employees and a continuity of business purpose between the old and new enterprise."

the courts should look solely to changes which the employer could lawfully make under the agreement. If those alterations neither effect a fundamental redirection of the operation's basic aims, nor require employees possessing substantially different skills, a finding of successorship is required. For where the business retains its basic function, and the jobs remain essentially the same, the existing collective agreement will continue to fit the situation. And where that is so, the national labor policy requires that the contract continue in force.

CONCLUSION

For the above stated reasons, as well as those developed by the NLRB and the Union, the Board's decision should be enforced.

Respectfully submitted,

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